STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD STEVEN ACKERMAN,

Defendant,

and

TIMES HERALD COMPANY, MARK RUMMEL, and TONY PITTS,

Appellants.

UNPUBLISHED
June 12, 2001

No. 228937
St. Clair Circuit Court
LC No. 99-001635-FC

Before: Bandstra, C.J., and Griffin and Collins, JJ.

PER CURIAM.

Appellants Times Herald Company, Mark Rummel and Tony Pitts appeal by leave granted the trial court's order denying their motion to vacate an order prohibiting the photographing of jurors and denying the return of film seized pursuant to their breach of that order. We affirm.

Appellants first challenge the constitutionality of the order as overbroad, facially bereft of time, place, and manner restrictions, and a prior restraint. The constitutionality of the court order is a question of law that is reviewed de novo on appeal. *Mahaffrey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997). We do not find the order here to be unconstitutional.

Freedom of speech and of the press are guaranteed by federal and state constitutional provisions. US Const, Ams I, XIV; Const 1963, art 1, § 5. Closely associated with freedom of the press is the corresponding right of access to information, without which the former is effectively meaningless. See *Branzburg v Hayes*, 408 US 665, 681; 92 S Ct 2646; 33 L Ed 2d 626 (1972). Consistent with this principle, constitutional jurisprudence has developed a tradition of opening many courtroom proceedings to the press and the public.

However, the press's right of access must be balanced against other considerations, including the jury's right to privacy. *In re Disclosure of Juror Names*, 233 Mich App 604, 613; 592 NW2d 798 (1999). This Court has recently held that privacy concerns may justify restrictions on the press such as a brief waiting period or an order prohibiting reporters from repeatedly attempting to question jurors who have already refused an interview. *Id*. at 630. Similarly, other courts have long recognized that the freedoms and access guaranteed to the press are not absolute but must be balanced against the competing duty of maintaining the integrity and decorum of the judicial process. See *Richmond Newspapers, Inc v Virginia*, 448 US 555, 581 n 18; 100 S Ct 2814; 65 L Ed 2d 973 (1980).

In pursuit of these objectives, the Michigan Supreme Court promulgated Administrative Order No. 1989-1 (AO 1989-1), which allows the judiciary to exercise its discretion to assure the fair administration of justice, specifically by limiting film coverage of jurors. AO 1989-1, § 2(b), (c); 432 Mich cxii-cxiii (1989). Following the media's behavior during the original criminal trial in this case, the St. Clair Circuit Court, with the approval of the Supreme Court, issued an administrative order governing media coverage and incorporating the provisions of AO 1989-1. That order reads in pertinent part:

> D. The judge has sole discretion to exclude, terminate, suspend or limit film or electronic media coverage. He/she may do so at any time upon a finding, made and articulated on the record in the exercise of discretion, that the fair administration of justice requires such action, or that rules established under this order or additional rules imposed by the judge have been violated. The judge has sole discretion to exclude coverage of certain witnesses.
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> E. Film or electronic media coverage of the jurors or the jury selection process shall not be permitted. [Administrative Order 2000J-1.]

Consistent with AO 2000J-1, the trial court, at the close of the second criminal trial issued the following order from the bench:

> Now, members of the jury, that completes your responsibilities as it relates to this case. It's the intent of the Court to make certain provisions to give you the protection that you are entitled to as private citizens. You were issued notices, subpoenas to appear and be jurors, and you've performed that task. *I'm ordering **at this time** that there will be absolutely no photographing or filming by any news media persons of any of the jurors that have sat on this case*. And if any of them were to do that, they would be violating my, my Order.
>
> I'm going to have you taken back to the jury room, and I'm going to make provisions, as were explained to you by the Bailiffs, to put you in a position where you'll have the ability, if you choose, to be escorted from the premises, and, *I'm ordering that if this is your choice, that no one is to interfere with **you until such a time** that you've had an opportunity of leaving*. And then those of you who might choose to stay around or wish to make yourself available to talk with anyone, you're going to be free to do that as you may choose, and we'd keep you back and then allow you to leave the front of the courthouse, and then after that

> you would be on your own, you could discuss or not discuss this case with any – anyone as you may choose. But I do want to respect your, your rights and your privacy, because we didn't give you a choice. We said: You come here, you be jurors. And you've done that. And then after that we have no longer any hold over you. [Emphasis added.]

Although orally issued, the order was entered by a court of proper jurisdiction and should have been obeyed even if the photographers considered it incorrect.[1] *Schoensee v Bennett*, 228 Mich App 305, 317; 577 NW2d 915 (1999).

Generally, orders prohibiting media access to jurors of unlimited duration are unconstitutional; such orders must be supported by a compelling governmental interest and narrowly tailored to achieve that objective. See, e.g., *In re Express-News Corp*, 695 F2d 807 (CA 5, 1982) (striking down order that prohibited all post-verdict interviews with jurors concerning their deliberations or verdict in criminal case, unless prior approval obtained from court); *United States v Sherman*, 581 F2d 1358 (CA 9, 1978) (striking down trial court's post-verdict order prohibiting the media from contacting jurors where there was no clear and present danger of denial of fair trial or harassment of jurors). Here, however, in contrast, we find the prohibition to be of limited duration and reasonable in scope. In interpreting the duration and scope of the order, the provisions prohibiting the photographing of jurors cannot be read in isolation as appellants would have it. Instead, they must be read in conjunction with attending instructions and the rationale provided for the order. The trial court's statement, "at this time," when read in conjunction with and in context of the court's other statement, "that no one is to interfere with you until such a time that you've had an opportunity of leaving," requires the conclusion that the media restrictions applied to the brief period immediately following trial. The trial court's affidavit supports this position – its intention was not to prohibit the jurors from exercising their choice to be interviewed or photographed. The intent was merely to prohibit the media from intruding or interfering with the jurors' departure from the courthouse, immediately following a highly controversial and emotional trial. We conclude that the order was not impermissibly overbroad.

Appellants also argue that the court's order entailed inhibitions against news coverage of the trial and carries a heavy presumption of being an unconstitutional prior restraint. However, a law (or court order) "do[es] not offend the First Amendment merely because its enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v Cowles Media Co*, 501 US 663, 669; 11 S Ct 2513; 115 L Ed 2d 586 (1991). Generally, time,

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[1] Although oral issuance of the order contradicts the provisions of MCR 2.602(A)(1), which requires all judgments and orders to be in writing and signed by the court, we will nonetheless rely on the transcripts to determine the content and scope of the trial court's order. The order was issued in open court and the court indicated its reason for promulgating the order. As such, it carries the indicia of formality associated with a written order. See *People v Vincent*, 455 Mich 110, 125; 565 NW2d 629 (1997); see also *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996) (noting that oral orders are to be given the same weight and effect as those in writing).

place, or manner restrictions on the exercise of First Amendment rights are permissible in public forums provided the restrictions are content neutral, narrowly tailored to serve a significant government interest and leave open alternative channels of communication. *Ward v Rock Against Racism*, 491 US 781, 791; 109 S Ct 2746; 105 L Ed 2d 661 (1989). To determine if the disputed order is an unconstitutional prior restraint, this Court must analyze its operation and effect in the particular circumstances of this case. See, e.g., *Kingsley Books, Inc v Brown*, 354 US 436, 441-442; 77 S Ct 1325; 1 L Ed 2d 1469 (1957). We must determine whether the order was reasonable and served a legitimate purpose sufficient to override its incidental effects on appellants' First Amendment rights. *Globe Newspaper Co v Superior Court*, 457 US 596, 616; 102 S Ct 2613; 73 L Ed 2d 248 (1982).

Because the news media had the opportunity to view the jurors during trial and the jurors' names were publicized during the polling of the jury, appellants were provided the information necessary to request interviews and photographs after the jurors were dismissed. Moreover, the record indicates that there were ample photographs of the participants, "defendant and others," already available and publishable. This defeats the argument that the restrictions severely curtailed the media's right of access and the public's "right to know." Because the temporary prohibition of photographing the jurors did not prevent publication of material already gathered or readily available, the order did not constitute an unconstitutional prior restraint on the media. Rather, the order was a reasonable time, place, and manner restriction. The order was adequately tailored to satisfy the limited purpose of maintaining the decorum of the court and the temporary privacy of the jurors in the minutes immediately after the end of trial. Jurors are entitled to privacy and to protection against harassment even after completing their service. *United States v Harrelson*, 713 F2d 1114, 1116 (CA 5, 1983).

We note that the circumstances of this case fall squarely within the parameters outlined by this Court in *In re Disclosure of Juror Names, supra* at 630:

> To a lesser extent, we recognize jurors' interest in their privacy. Privacy concerns alone, unaccompanied by safety concerns, are not sufficient to justify total denial of media access to jurors' names. To use the trial court's phrase, jurors are "citizen-soldiers" charged with carrying out an important public responsibility. As with any other public officers, jurors sometimes must bear certain irritations in carrying out their duties. However, privacy concerns may justify a lesser restriction, such as *a brief waiting period* or an order prohibiting reporters from repeatedly attempting to question jurors who have already refused an interview. [Emphasis added.]

Such were the circumstances presented here. The jurors were given an opportunity to be interviewed but none chose to do so. They were taken through the rear exit to avoid the media but these attempts were unsuccessful. Appellants were repeatedly told that the court had ordered that no photographs be taken but they still persisted. After reviewing the order in the context of its delivery and consideration of the circumstances of the case, we conclude that it survives First Amendment scrutiny.

Appellants further argue that the trial court violated their Fifth Amendment due process rights when it failed to follow proper procedures in arresting the photographers and seizing their

film without a hearing. They also argue that seizure of the film was not the proper sanction and that the trial court should have considered alternative sanctions which would have had a lesser impact on First Amendment rights.[2] The determination whether a party has been afforded due process is a question of law subject to de novo review on appeal. *In re Carey* 241 Mich App 222, 226; 615 NW2d 742 (2000). We find appellants' arguments to be without merit.

The federal and Michigan constitutions guarantee that no person may be deprived of life, liberty or property without due process of law. US Const, Am V; Const 1963, art 1, § 17; *St Louis v MUSTAFA Policy Bd*, 215 Mich App 69, 74; 544 NW2d 705 (1996). Underlying the right of due process are the principles of fair play and fundamental fairness. *Building Owners & Managers Ass'n v Public Service Comm*, 131 Mich App 504, 513; 346 NW2d 581 (1984), aff'd 424 Mich 494; 383 NW2d 72 (1986). Generally, due process in civil cases requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker. *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000). These considerations must be weighed against factors of economy and practicability. *Harter v Swartz Creek (On Rehearing)*, 68 Mich App 403, 407; 242 NW2d 792 (1976). The concept of due process is flexible, and analysis of what process is due in a particular proceeding depends on the nature of the proceeding, the risks and costs involved, and the private and governmental interests that might be affected. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993); *Ansell v Dep't of Commerce (On Remand)*, 222 Mich App 347, 360-361; 564 NW2d 519 (1997).

In the instant case, the Times Herald photographers were arrested and taken to the judge's courtroom. The arresting bailiffs informed the judge of the photographers' intentional disobedience of the court's order. The court advised the officers that it wanted to review reports from all involved officers before making a decision. To preserve the status quo, the court ordered the film seized and the photographers released.

We find nothing unconstitutional here. The imminent harm threatened by the contravention of the order, both to jurors' privacy and the court's right and obligation to maintain judicial decorum, precluded immediate factfinding proceedings from being initiated. Until such proceedings could be scheduled, the trial court sought to preserve the parties' relative positions by seizing the film. It did this by ordering the film seized and the photographers released until such time that it could apprise itself of the facts and conduct a hearing. This decision was reasonable and took into consideration the nature of the proceedings, the risks and costs involved, and the private and governmental interests that would be affected. *In re Brock, supra* at 111; *Ansell, supra* at 360-361.

The circumstances of this case are similar to those presented in *Marin Independent Journal v Municipal Court for the Marin Judicial Dist*, 12 Cal App 4th 1712; 16 Cal Rptr 2d 550

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[2] To the extent that appellants complain that contempt proceedings should have been instituted, they failed to identify this issue in their statement of arguments and we consider it waived. MCR 7.212(C)(5); see also *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).

(1993), where the California Court of Appeals affirmed the confiscation of photographs taken in violation of a local court rule. *Id*. at 1718-1719. There, the court concluded that the seizure of the film was justified because "the photographs were obtained unlawfully in a deliberate violation of a rule of court," and "[i]t would make a mockery of that rule, and of the power and dignity of the court, to allow publication of photographs unlawfully obtained." *Id*. at 1719, 1721.

Although individuals may not be deprived of their property unless such action is supported by valid authority based on law, *People v Rosa*, 11 Mich App 157, 161; 160 NW2d 747 (1968), there is no requirement that a predeprivation hearing be held every time an individual is deprived of a property right. See *Mitchell v WT Grant Co*, 416 US 600, 611; 94 S Ct 1895; 40 L Ed 2d (1974). To the contrary, the usual rule has been that "'[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.'" *Id*., quoting *Phillips v Commissioner*, 283 US 589, 596-597; 51 S Ct 608, 611; 75 L Ed 1289 (1931). Such opportunity was provided at the hearing on appellants' motion to vacate the trial court's order. Argument was heard at that time regarding the constitutionality of the seizure of the film and alternatives to the seizure.

We conclude from the record that the photographers were eminently aware that they were being arrested for breach of the trial court's order. They were later afforded a hearing on that charge and were given a reasonable opportunity to present defense or explanation. Due process requires no more.

We affirm.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Jeffrey G. Collins